IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5412

JOHN R. DILLARD, *et al.*,

Appellants,

—v.—

INDUSTRIAL COMMISSION OF VIRGINIA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AND THE AMERICAN MUTUAL INSURANCE ALLIANCE AS *AMICI CURIAE*

JAMES F. FITZPATRICK
DAVID BONDERMAN
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Amici Curiae

Of Counsel:

LINDA F. BLUMENFELD
ARNOLD & PORTER
Washington, D. C.

ANDREW KALMYKOW
New York, N. Y.

RICHARD E. GOODMAN
Chicago, Illinois

March, 1974

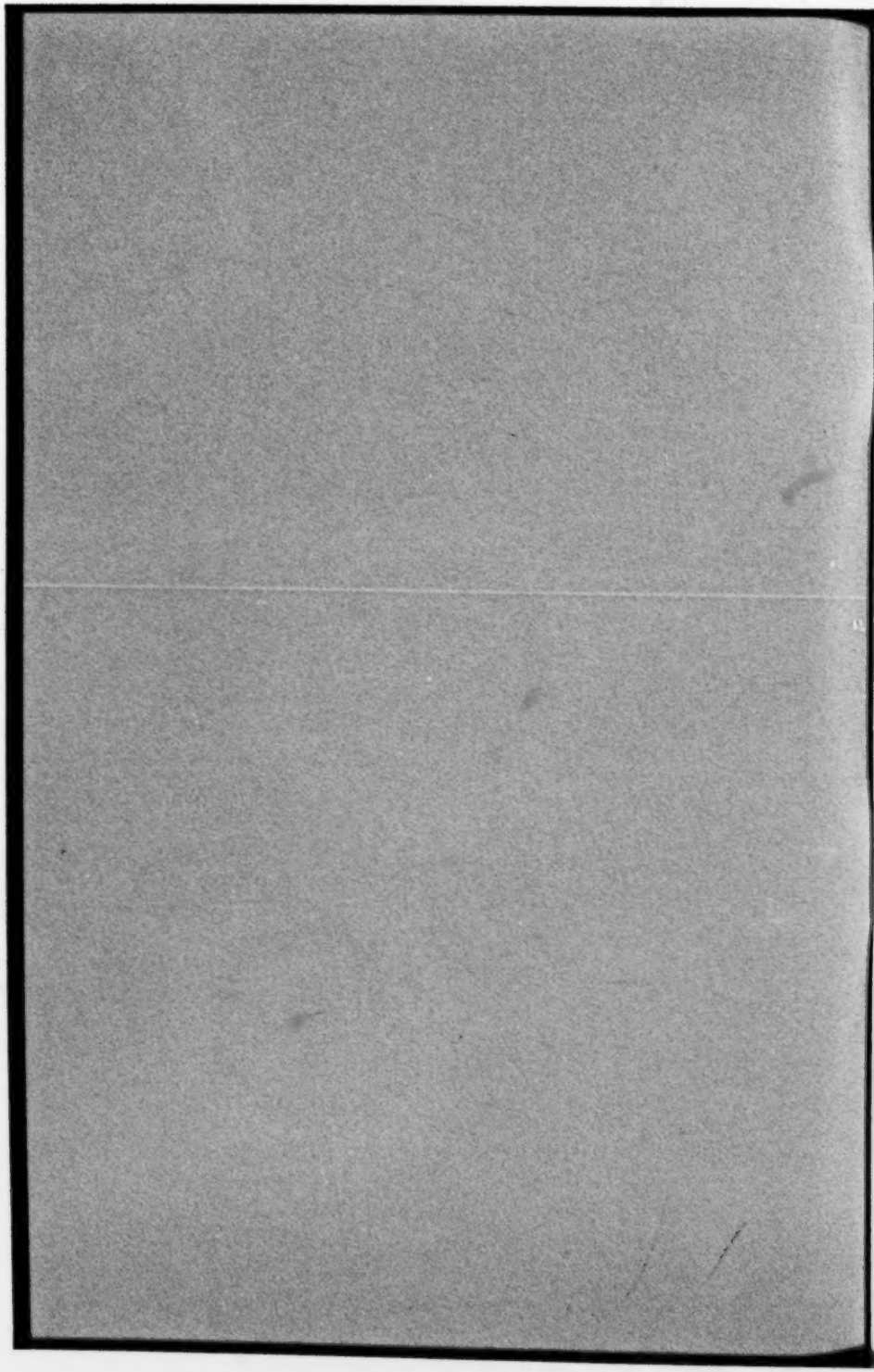

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5412

JOHN R. DILLARD, *et al.*,

Appellants,

—v.—

INDUSTRIAL COMMISSION OF VIRGINIA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AND THE AMERICAN MUTUAL INSURANCE ALLIANCE AS *AMICI CURIAE*

CONSENT TO FILING

This Amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

INTEREST OF *AMICI CURIAE*

American Insurance Association. The American Insurance Association ("AIA") is an association of 126 stockholder-owned property-casualty insurance carriers. AIA members write approximately 40% of the workmen's compensation insurance in the United States and do business in most States.

American Mutual Insurance Alliance. The American Mutual Insurance Alliance ("AMIA") is an organization of more than 100 mutual property-casualty insurance carriers. AMIA members write approximately 35% of the workmen's compensation insurance in the United States and do business in most States.

The decision of this Court in the present case will have a substantial effect upon the existing workmen's compensation contracts written by members of the AIA and AMIA and upon the future workmen's compensation contracts written by AIA and AMIA members. The AIA and AMIA are vitally interested in the satisfactory operation of workmen's compensation systems in order to assure that their members may fully and fairly compensate injured workers with a minimum of delay and unnecessary inefficiency.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Virginia below is reported at 347 F. Supp. 71 (1972). It appears in the Appendix ("App.") at pages 46-65.

JURISDICTION

Probable jurisdiction was noted on December 17, 1973, and the case is before the Court under 28 U.S.C. § 1253.

QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that an employer or his insurance carrier continue workmen's compensation payments in every case pending a full evidentiary hearing, even though the Virginia Industrial Commission, the State agency which supervises workmen's compensation, has found, based upon evidence examined in an *ex parte* hearing, that there is probable cause to believe that the employee involved is no longer eligible to receive workmen's compensation, and even though in the overwhelming majority of cases the employee does not disagree with this finding?

STATEMENT

The system of workmen's compensation currently utilized in each of the 50 States and the District of Columbia is designed to minimize dislocation to the work force, and to individual workers, from the more than 10,000,000 yearly work-related injuries. See The Report of the National Commission on State Workmen's Compensation Laws 31-32 (1972) [hereinafter cited as National Commission Report]. While no two of these State acts are precisely alike, most of them have similar basic features: they provide for cash benefits, medical care, and rehabilitation services for workers who suffer work-related injuries or diseases. In all but one State, an administrative agency exercises some responsibility over workmen's compensa-

tion claims. In 45 States, the administrative agency adjudicates disputes concerning eligibility for benefits and extent of disability. National Commission Report 32-33.

However, unlike other somewhat similar payment schemes such as welfare and unemployment compensation, workmen's compensation systems for non-governmental employees are entirely privately funded and largely privately handled. Workmen's compensation statutes provide that each employer shall compensate his disabled workmen. The employer usually makes insurance arrangements with a private carrier—often, as noted, an AIA or AMIA member—to meet his statutory obligations. In 32 states, all workmen's compensation insurance is written by private carriers; in 12 states, private and state operated insurance carriers compete; and in 6 states, insurance is provided only by state operated carriers. National Commission Report 33.

However, in all states the moneys actually spent for workmen's compensation benefits are paid by employers, either directly or through premiums to insurance carriers, and, in contrast to welfare and unemployment compensation, do not come out of general or special state or federal contributions.[1] Furthermore, the costs incurred by each employer are directly related to the amount of benefits paid to his injured workers: 80% of employees work for employers who are assessed extra amounts if they have poor safety records. See generally National Commission Report 33.

[1] In 1970, for example, U.S. employers paid $4.9 billion for workmen's compensation. Compendium on Workmen's Compensation 6 (1973).

A. *Background of the Workmen's Compensation System*

Just after the turn of the 20th century, United States industrial injury rates reached an all-time peak. However, it was recognized that tort remedies available under the common law to workers injured or killed on the job, or to their families, were less than adequate. Injured workers found that courts tended to lack sympathy for their complaints and that the defenses of contributory negligence and assumption of the risk, and the fellow servant doctrine, made it difficult to recover from an employer. Furthermore, even where an injured worker could recover, the fact that the compensation system was based upon liability for negligence imposed high legal costs and made for long delays. See National Commission Report 33-34. Indeed, in many instances even an employee who successfully obtained a judgment was unable to collect because the employer was judgment proof.

As a result, the principle of "no fault" workmen's compensation was developed early in the century. The costs of work-related injuries were to be borne by the employer according to a set formula, thus providing prompt and effective compensation to the injured worker without the necessity of wasteful litigation. Furthermore, it was thought that, by making the employer's costs dependent upon his safety record, such a no-fault scheme would promote better safety practices. These objectives were supported by both the National Association of Manufacturers and the American Federation of Labor. As a result, between 1911 and 1920, 42 states passed workmen's compensation statutes similar to the Virginia statute before the Court in the present case. National Commission Report 34-35. Today, as noted, all 50 states and the District of Columbia have workmen's compensation statutes.

According to the study made by the National Commission, workmen's compensation statutes have five principal objectives. These are:

(1) to provide broad coverage for employees subject to work-related injuries or diseases;

(2) to provide substantial protection to injured workers against interruption of income;

(3) to assure sufficient medical care and rehabilitation services;

(4) to encourage safety by providing economic incentives for each employer to reduce work-related injuries and injuries; and

(5) to deliver these services as inexpensively and as efficiently as possible. National Commission Report 35-40.

In order to maximize the availability of benefits while keeping costs as modest as possible, as the foregoing objectives require, all workmen's compensation systems have been designed to minimize litigation and the resort to adversary proceedings. As the National Commission noted, excessive litigation results in unnecessary delay, expense, and interference with rehabilitation. National Commission Report 119. The Commission stated that:

"In almost every State, claimants' attorneys' fees are deducted from awards to the workers. Their fees, while reflecting considerable service to employees, are a significant proportion of the total monetary cost of workmen's compensation. Less obvious costs of litigation which affect the performance of the delivery system may be even more substantial. These costs include delays and uncertainties resulting from legalistic jousting over means of determining benefits, as well as the immeasurable cost of interference with or delay of rehabilitation of the disabled. An equally tragic side-effect of litigation is the tendency to polarize

attitudes of labor and management to the extent that both resist reforms that would be to their common advantage.

Workmen's compensation can be undermined by excessive litigation." National Commission Report 100.

The advantages of the present system, which is largely characterized by informal procedures and minimizes resort to adversary proceedings, are evident from the statistics reported by the National Council on Compensation Insurance: in 1972 the private insurance carriers which do most of the underwriting of workmen's compensation returned fully 75.3% of the premium funds expended by employers as workmen's compensation benefits to employees.

In contrast, the former New York system of workmen's compensation (since modified) required a full hearing in every case before benefits could be suspended. This is the type of system that Appellants seek to impose upon all States as a constitutional requirement. The inefficiency and cost of such a system were the major reasons for New York's abandonment of the required hearing procedure. See A. Dawson, Administration of the Workmen's Compention Law in the State of New York, First Report to Hon. Thomas E. Dewey, in Public Papers of Governor Dewey 456, 458-460 (1954). Similarly, Massachusetts presently has a workmen's compensation system which requires a hearing in almost every instance prior to termination of benefits. The result has been a twelve to eighteen month delay with a backlog (as of 1971) of 8,000 to 9,000 cases. See M. Brooke, Administering Workmen's Compensation Cases in California, Florida, Massachusetts, New Jersey, New York, and Wisconsin in III Supplemental Studies for the National Commission Report 77, 80-81 (1973); National Commission on State Workmen's Compensation Laws, Public Hearings 47, 87 (October 18, 1971).

The inequities and delays which result from the Massachusetts system, and which resulted from the now-abandoned New York system mentioned above, contrast unfavorably with usual prompt resolution of workmen's compensation problems in the vast majority of states which do not require unnecessary formalities. Indeed, for these reasons, almost all states have adopted workmen's compensation systems—of which the Virginia system at issue here is typical—which work largely on a non-adversary basis. For example, under the present New York system, 96.2% of all workmen's compensation claims are resolved without resort to adversary proceedings. State of New York, Workmen's Compensation Board, Carrier Performance 21 (1973).[2]

B. *The Virginia Workmen's Compensation System*

The Virginia Workmen's compensation system has changed relatively little since it was first established in 1918, although it has been amended a number of times, most recently in 1973. 9 VA. CODE Title 65.1 (1950). Workmen's compensation in Virginia is administered by the Industrial Commission, a six member body consisting of three commissioners and three deputy commissioners; it serves as a moderator between employers and employees. The Commission's mission is to protect employees; the workmen's compensation statutes specifically provide that they are to be liberally construed in favor of employees. *See, e.g., Griffith* v. *Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942). Funds for the system come entirely

[2] Furthermore, testimony from the nation's second largest workmen's compensation carrier to the National Commission on State Workmen's Compensation Laws indicated that 95% of its claims nationwide were resolved without recourse to adversary proceeding. See Testimony of M. John Bright of the Travelers Insurance Company, before the National Commission (Dec. 13, 1971).

from employer contributions which are managed by the insurance companies writing workmen's compensation insurance in the State. App. 28.

1. The Present System

Although in the past an employee could elect whether to proceed under the workmen's compensation system or whether to pursue his common law remedies, as of January 1, 1974, workmen's compensation is compulsory and common law remedies are no longer available to injured workers. Rather, an injured worker is entitled to recover benefits so long as he is disabled. For total or partial disability, these benefits consist of medical payments and cash in the amount of 66⅔ percent of the worker's weekly wage or $80.00,[3] whichever is less, up to a maximum of 500 weeks and $40,500 (except for total permanent disability in which case there are no upper limits on recovery). 9 VA. CODE §§ 65.1-54, -55, -56, -71.

An injured worker is entitled to begin receiving payment after an award is entered by the Commission, or if the employer and employee agree upon the nature of the award. As described in detail below, most awards are determined by agreement although in order to assure that such agreements adequately protect the employees involved, they must be approved by the Commission. 9 VA. CODE §§ 65.1-93, -94. In actuality, since carriers recognize that long delays in the commencement of compensation payments may work a hardship upon injured employees, payment is usually begun *even before* an agreement is reached or an award is made.

---

[3] In 1973, maximum workmen's compensation benefits varied from $56 per week in Kansas and Mississippi to $175 per week in Alaska and $167 per week in the District of Columbia. Kemper Insurance Co., Public Affairs Newsletter, Vol. 4, No. 1, p. 2 (February 18, 1974).

Once an award is entered, either by agreement between the employer and the employee, or as a result of the decision of the Commission, the employee receives the amount awarded so long as he remains disabled. As a formal matter, these awards are not self-enforcing. In the event that the employer refuses to pay an award, an employee may petition the Commission or may sue in any circuit court to enforce the award. 9 VA. CODE § 65.1-100. In practice, however, carriers pay Commission awards as a matter of course and there is rarely litigation in such cases. Thus, though an award or agreement approved by the Commission can be enforced by the Commission or the courts, the success of the workmen's compensation program in Virginia, as elsewhere, is based upon informal procedures[4] and the voluntary cooperation of the parties involved.

In the vast majority of cases, agreements are negotiated between the employer or, more typically, his insurer, and the employee. For example, between 1967 and 1971, the Commission approved between 19,000 and 21,000 agreements between workers and employers each year. During this period, the number of cases in which the parties failed to reach agreement (and hence eligibility was determined by decision of the Commission) ranged between 1,000 and 1,500 annually. Thus, approximately 95% of all claims for workmen's compensation were resolved informally by the parties themselves and compensation began virtually immediately. App. 36-37.

A worker is eligible for workmen's compensation payments only so long as his disability remains. Thus, a

[4] The workmen's compensation statutes require, for example, that the rules of the Commission be as simple as possible. 9 VA. CODE § 65.1-18.

worker who was injured on the job may fully recover and hence no longer be entitled to workmen's compensation benefits. Or he may suffer an injury which, in its long-term effect, is only partially disabling so that he is entitled only to a partial amount of workmen's compensation. In either of these instances, the worker's eligibility for full workmen's compensation benefits ceases. Furthermore, the Virginia system provides that where an employee is permanently disabled, either totally or partially, a lump sum settlement may be reached in place of weekly payments, subject to the approval of the Commission. 9 VA. CODE § 65.1-74.

There are two procedural methods for terminating or modifying an outstanding award (including an award based upon the agreement of the parties). Just as the employer's insurance carrier and the employee typically agree as to the commencement of workmen's compensation benefits, the carrier and the employee usually concur when the employee's condition has improved and the award should be terminated (in the event that the employee has fully recovered) or decreased (in the event that the employee has partially recovered). Most workers treat the system fairly and, when they are able to go back to work, do so and cease to collect payments. Thus, during the period from 1967 to 1971, the State of Virginia had only between 700 and 1,000 cases per year in which the employer and the employee disagreed as to the continuance of payments out of approximately 20,000 cases each year. Thus, approximately 95% of payments of workmen's compensation are terminated by agreement. App. 36-37.

Alternatively, in those relatively few instances where no agreement is reached between the employer and employee as to the cessation of payments, the employer or insurance

carrier petitions the Commission to revoke its award. The formal revocation of the award occurs only after a full trial-type hearing on the merits, the sufficiency of which is not at issue here. As noted, there are approximately 700 to 1,000 of these hearings per year, held in the county in which the injury occurred—that is, where the employee worked (in order to minimize the inconvenience to the employee). 9 VA. CODE § 65.1-94.

Under the Virginia workmen's compensation system, an employer or his insurance carrier which overpays, or which pays monies to an ineligible employee, has no right of recoupment. 9 VA. CODE § 65.1-99. In view of the denial of recoupment, for many years prior to the adoption of the present Rule 13 insurance companies and employers simply suspended payments in those instances where they believed that an employee was no longer eligible for benefits. If it was later determined at the revocation hearing that the employee was not in fact eligible for compensation, the award was revoked and the employer or his carrier had not made excess and nonrecoverable payments. On the other hand, if the employee was still eligible for compensation, the employer would be required to make back payments, as well as to continue future payments.

However, there was concern in Virginia that the old system created pressures to suspend payments in some instances when perhaps they ought not to have been. This caused hardships to some injured employees whose payments were stopped temporarily until reinstated after a later hearing. The present Rule 13, as described in detail below, was adopted precisely to avoid any possibility of improper suspension of payments in even a few cases.

2. Rule 13

On March 21, 1972, in part because of the experiences of Mr. Dillard, one of the plaintiffs herein, and in order to further protect injured employees by assuring that payments would not be improperly suspended by employers or insurance carriers, the Commission revised its Rule 13. Rule 13 now provides that an employer or carrier may not suspend payment of workmen's compensation—even though it may believe that a claimant is no longer eligible to receive benefits—until such time as the employer or carrier files with the Commission its evidence indicating that the employee is no longer eligible, and until such time as the Commission passes upon that evidence *ex parte* and determines that there is probable cause to believe that the employee is no longer eligible.

Rule 13 operates as follows. When a carrier believes an employee is no longer eligible to receive all or some workmen's compensation benefits but the employee will not agree to a termination of benefits, the carrier files an application for review with the Commission. As a general practice, a copy of the application is furnished the employee. The application for review must be verified by the insurance company and supported by appropriate accompanying documents, *e.g.*, doctor's medical report, employer's letter indicating resumption of employment, etc.

Once the application is received, it is processed within a few days by the Deputy Commissioner for Administration, who is required to be an attorney, or by his assistant. An employee may, under the present Rule 13, file a written statement or submit evidence opposing the probable cause determination. However, in fact this rarely occurs because the employee normally does not have access to the employer's evidence and because the Commission acts rapidly

without waiting to receive any submission from the employee. (However, if an employee does send in information even after probable cause is found, the Commission will evaluate the information. If the information indicates that payment should not be suspended, the Commission informs the carrier and the carrier then continues payments to the claimant).

If, on the basis of the application, and the accompanying evidence, probable cause for termination of eligibility is found, the carrier may suspend its payments. If no probable cause is found, the employer or carrier is required to continue payments. In about one-third of the cases, the Commission finds no probable cause; in the remaining two-thirds of the cases, probable cause is found.

The employee has a right to a full hearing on the question of the termination of the compensation award if probable cause has been found and often exercises that right. The adequacy of that full hearing is not at issue here. In those instances in which such a full hearing is later held, the probable cause determination is almost always affirmed. Of a sample of 202 cases, all involving applications filed after the adoption of the revised Rule 13, in which probable cause had been found at the *ex parte* hearing, 185 employees were found ineligible after the full hearing. Thus, the Commission's probable cause finding was affirmed after the full hearing in 91.6% of the cases. State Br. 7 n. 8.

The Commission uses the following guidelines in determining whether there is probable cause to believe that an employee is no longer eligible to receive workmen's compensation:

1. When the reason alleged for ineligibility is that the employee is able to return to work but refuses, the employer's application must be accompanied by a doctor's report indicating ability to return to work. The doctor's medical report must indicate that the employee can return to work within seven days; speculation as to the employee's condition further into the future will not support a probable cause finding. If the case is borderline, then the Commission examines the whole medical record to determine if there is probable cause.

2. When an employee has in fact returned to work but will not so acknowledge in a written statement and hence continues to draw compensation, the application from the employer or insurance carrier should be accompanied by a letter from the employer indicating when the employee returned to work. However, the Commission will also accept the insurance carrier's affidavit that the employee has returned to work. In this case, probable cause for change of condition is found.

3. When the employer or insurance carrier alleges that the employee is able to return to work on a restricted basis, two factors are required for a probable cause finding. First, there must be a doctor's report which outlines what restricted kind of work the employee can do. Second, the carrier must find the employee an appropriate job consistent with the doctor's report.

4. When the ground alleged for lack of eligibility is that the employee refuses medical attention, the employer must show that appointments have been arranged with the employee's doctor and the employee has not appeared or has refused to cooperate with the doctor. The Commission requires the doctor's statement to this effect, not

just the carrier's. In determining probable cause, the whole file is examined. If the employee has kept his appointments before, then probable cause will not be found. If there is a history of not keeping appointments, however, then probable cause will be found.

5. When the carrier's application is based on the allegation that the employee cannot be located, then the case is automatically put on the docket for hearing and probable cause is found. However, if the employee makes his whereabouts known, either by appearing for the hearing, or in advance of the hearing, then the company must reinstitute payment immediately.

When probable cause is found—which, as indicated, occurs in about two-thirds of the cases—the case is docketed for a full trial-type hearing before a single Commissioner or Deputy Commissioner on the issue of whether the award should be terminated. Decisions of a single Commissioner are appealable to the full Commission and then to the Virginia Supreme Court of Appeals. It should be noted that many cases in which probable cause is found never reach the hearing stage either because a settlement is made between the parties or because the claimant signs a release of the award. Furthermore, as the foregoing statistics indicate, of those cases that do go to hearing, some 91.6% of the probable cause findings are sustained. It is thus clear that the *ex parte* Rule 13 procedures do provide for a careful governmental examination of the situation, and result in significant protection for the employee against any possibility of unfair or improper termination of workmen's compensation benefits. *Cf. Manchester Board and Paper Co.* v. *Parker,* 201 Va. 328, 111 S.E.2d 453 (1959).

It is equally evident that the Virginia workmen's compensation system functions effectively in providing prompt

benefits to injured workers because of its essentially voluntary nature. Employers and their insurance carriers commence payments promptly, without requiring a finding of eligibility by a formal hearing, because they understand that, at the other end, when the Commission finds that there is probable cause to believe a worker is no longer eligible, they may suspend payments pending a full hearing. Requiring greater formality before payments may be suspended will likely in practice mean more formalities before employers will commence payment in the first place. Such entrenchment of formalities will make workmen's compensation more expensive and less effective than it is now, and ought to be avoided. See National Commission Report 100.

C. *The Cases of Messrs. Dillard and Williams*

Mr. Dillard. Mr. Dillard's situation, wherein his workmen's compensation payments were twice suspended by the unilateral action of his employer's insurance carrier and twice reinstated by the Commission upon hearing, is fully described in Appellants' Brief, pages 4-5. We agree with Appellants that a workmen's compensation system should protect against unjustified suspensions of benefits. However, we believe that the present procedures under revised Rule 13 do just that.

It should be noted that both suspensions of Mr. Dillard's payments occurred in 1971, prior to the adoption of the present Rule 13 by the Commission. Indeed, as pointed out earlier, the new Rule 13 was adopted precisely to assure that situations like Mr. Dillard's did not arise again. Thus, under the Commission's current procedures, described in detail above, an employer cannot suspend payments until the Commission finds probable cause to believe that the employee is no longer eligible for workmen's compensation

benefits. Furthermore, it is clear that under the present Rule 13 the Commission would not have found probable cause based upon the evidence acted upon by Mr. Dillard's employer's carrier. See App. 13-16. Hence the Commission would not have permitted the suspension of Mr. Dillard's payments had the present Rule 13 been in effect during the pendancy of Mr. Dillard's case.

Mr. Williams. Mr. Williams' situation is different, in that his case was processed under the new Rule 13. The facts are described in full in the Appellants' Brief at page 6. In short, Mr. Williams was receiving workmen's compensation when his employer's carrier filed a request with the Commission to revoke the award on the ground that Mr. Williams was no longer eligible to receive compensation. In accordance with the new Rule 13 procedures described above, the Commission held an *ex parte* hearing and on October 13, 1972, it determined that there was probable cause to believe that Mr. Williams was no longer eligible.

According to the Rule 13 procedures, Mr. Williams' carrier could suspend payments as of this date, and a full revocation hearing was scheduled. However, for some reason which does not appear in the record, the carrier had in fact suspended Mr. Williams' payments on October 11, before the probable cause determination and in violation of Rule 13. App. 71-72. When the Commission was informed of this violation of Rule 13, it ordered that Mr. Williams' payments be reinstated, which they were. However, on April 17, 1973, after another probable cause proceeding, Mr. Williams' benefits were again suspended, this time in conformity with Rule 13. Upon a full hearing thereafter, the Commission affirmed the probable cause finding and held that Mr. Williams was no longer eligible to receive

compensation. The Virginia Supreme Court of Appeals declined to review the Commission's judgment, which is final and not in dispute here.

ARGUMENT

We do not deal here with Appellants' contention that workmen's compensation benefits are a property right sufficiently important to eligible employees to warrant the application of the requirements of the Due Process Clause of the Fourteenth Amendment to a termination or suspension of such benefits. Assuming that Appellants are correct as to these contentions, they have merely stated the question involved here, not answered it, for due process involves "differing rules of fair play" in different situations. *Richardson* v. *Perales,* 402 U.S. 389, 401 (1971); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972). Appellants misconceive the thrust of this Court's prior decisions when they insist that nothing short of a full evidentiary hearing in every case prior to the suspension of benefits will satisfy the requirements of due process. Because, as the prior discussion indicated, only a very small percentage of cases are disputed, the requirement of a full evidentiary hearing in every case would impose vast amounts of unnecessary litigation. Such a result would be disastrous to the proper operation of the workmen's compensation system. We believe that, as the description of Rule 13 and of the workings of the Industrial Commission of Virginia set forth above pointed out, the procedures at issue here do afford due process under the factual circumstances present.

The Commission's Present Procedures Satisfy the Requirements of Due Process

The decisions of this Court have made it clear that different types of process are "due" in different cases, depending upon the interests at stake and the factual circumstances. There is no single hard and fast rule as to the procedures necessary in each instance. Compare *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), with *Richardson* v. *Perales, supra*. Thus, we start from the principle that

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests. . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . '[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action." *Cafeteria and Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 894-95 (1961). See also *Goldberg* v. *Kelly, supra*, 397 U.S. at 262-63; *Hannah* v. *Larche*, 363 U.S. 420, 440, 442 (1958); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

One recent decision of this Court aptly illustrates this rule. In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), the question of due process arose in the context of a limitation upon a person's right to the unrestricted enjoyment of disputed property where it was contended that

the property did not in fact belong to the person involved. This Court held that to satisfy the requirements of due process there must be procedures

> "which are aimed at establishing the validity, or at least the probable validity, of the underlying claim . . . [in dispute] *before* . . . [a person] can be deprived of his property or its unrestricted use." *Sniadach* v. *Family Finance Corp., supra,* 395 U.S. at 343 (1969) (Harlan, J., concurring).

While *Sniadach* involved the garnishment of a debtor's wages and hence Sniadach's property interest in his money was arguably greater than the Appellants' interest in receipt of workmen's compensation in the present case, we believe that the procedures at issue here fully comply with the requirements of *Sniadach.* Indeed, as the earlier description of the present Virginia procedures made clear, it is precisely a determination of "the probable validity" of a workman's claim for eligibility—that is, a determination of probable cause to believe that the person involved is not eligible to receive compensation—which is required under the Virginia procedures before payments can be suspended by an employer.

In our view, a comparison of the factual circumstances present and the procedures utilized in the present case with those in *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), and *Goldberg* v. *Kelly, supra,* upon which Appellants seek to rely, demonstrate that the lower court's finding that due process requirements have been satisfied here is correct and perfectly consistent with *Fuentes* and *Goldberg.*

Goldberg v. *Kelly, supra,* involved State welfare payments, out of State and federal funds. In *Goldberg,* New York welfare recipients had had their financial aid ter-

minated without any prior protective procedure at all,[5] supposedly because the State needed to act promptly to prevent unauthorized payments. Thus, against the welfare recipient's need for welfare payments was set the "countervailing governmental interests in conserving fiscal and administrative resources." 397 U.S. at 265. This Court found that the governmental interests asserted could not outweigh the interests of welfare recipients and that, while no judicial or quasi-judicial pretermination hearing was required, welfare recipients were entitled as a matter of due process to a meaningful, if informal, opportunity to have the merits of their termination evaluated prior to having their welfare halted. 397 U.S. at 266-68.

In *Fuentes* v. *Shevin, supra,* defendants had sold plaintiff goods under a conditional sales contract and when a dispute arose, utilized a writ of replevin summarily to seize the goods from plaintiff's home. The procedures under the statutes there at issue provided no means whatever of protecting the plaintiff's interest prior to the seizure of the property from plaintiff's possession. The court which issued the writ was not required to, and did not, examine the support for the seizure:

> "[N]o state official participates in the decision to seek a writ; no state official reviews the basis for a claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the . . . [party seizing the goods] provide any information to the court on these matters. The state acts largely in the dark." 407 U.S. at 93.

---

[5] During the course of the litigation, the State amended its procedures to provide for a hearing before the caseworker who recommended the cutoff. The caseworker was supposed to present both the welfare recipient's case against termination and the State's case in favor of termination to the supervisor who made the termination decision. 397 U.S. at 257-60.

In fact, as the majority opinion in *Fuentes* pointed out, there was not even a requirement that the defendants make a convincing showing that they were entitled to the goods before they seized them. 407 U.S. at 67-68.

The distinctions between the present case and *Goldberg* and *Fuentes* are evident: *First,* in the present case, there were significant procedures designed specifically to protect Appellants and other employees whose entitlement to continued workmen's compensation benefits is in dispute. These procedures involved a thorough review by the Virginia Industrial Commission based upon medical or other appropriate evidence submitted in a form specifically approved in *Richardson* v. *Perales, supra,* 402 U.S. at 403-05. Thus, there is no possibility of the Commission "acting in the dark," as in *Fuentes,* or not acting at all, as in *Goldberg.* The fairness of the procedure at issue here for employees is placed in proper prospective when it is recognized that the Commission is an arbiter of disputes between employers and employees. The Commission has no particular interest in supporting employers as against employees; indeed, it is designed to protect employees and required by statute to favor them. *Griffith* v. *Raven Red Ash Coal Co.,* 179 Va. 790, 20 S.E.2d 530 (1942). Furthermore, unlike the case in *Goldberg,* the Commission is not dispensing its own money to recipients of workmen's compensation. Thus, unlike the situation in *Fuentes* and *Goldberg,* there is no question as to any institutional bias of the Commission against employees' claims.

Second, in the present case an insurance company or employer may suspend its workmen's compensation payments only after the Commission has found "probable cause" to believe that the employee is no longer eligible to receive workmen's compensation. The Appellants' at-

tempt to suggest that "practical considerations" weigh in their favor because an employer will always serve its self-interest by suspending payments (Br. 22-23) thus misses the point. An employer cannot suspend payments unilaterally—it must await a determination of probable cause by the Commission. This is precisely the due process "convincing showing" of the merits of the employer's claim required by Justice Stewart in the majority opinion in *Fuentes,* 407 U.S. at 73-74, and the due process showing of "probable validity" of the employer's claim required by Justice Harlan in his concurrence in *Sniadach.* 395 U.S. at 343. Thus, unlike *Fuentes* and *Sniadach,* there is no question here of a delegation of the power to control the procedure to the private party involved.

The AFL-CIO, as Amicus Curiae herein, asserts that under the current Virginia procedures, the employer "is not required to show a likelihood of success on the merits" in order to suspend payment. AFL-CIO 14. This contention is based, purely and simply, upon a misunderstanding of the Virginia procedures. As our brief makes clear, an employer is required to demonstrate "probable cause" that the employee is not eligible for further benefits—which is precisely a showing of the likelihood of success on the merits—before payments may be suspended. Furthermore, the statistics set forth above at page 14, *supra,* make it clear that the showing required to demonstrate probable cause is significant: in fully one-third of the cases the Commission does not find probable cause. Moreover, in 91.6% of the cases in which probable cause is found by the Commission, the employer prevails at the full hearing thereafter. It is hard to imagine what more could be necessary to show likely success on the merits than a procedure in which the party prevailing at the initial proceeding prevails upon a later full hearing in 91.6% of the cases.

Third, unlike *Goldberg* v. *Kelly, supra,* the interests involved here are tripartite. Thus, this Court is not weighing the interests of welfare recipients in receiving their minimum allotments against the State's interest in efficiency. Rather, here we have two private parties with competing and equal property interests at stake. We do not contest that recipients of workmen's compensation have a meaningful interest in their contractual right to receive payments so long as they are eligible. Nor do we underestimate the fact that in many cases the employee's need for funds may be pressing, although obviously a temporary suspension of benefits does not contain the same potential for harm as a permanent revocation of benefits. *Sampson* v. *Murray,* 42 U.S.L.W. 4221, 4230 (decided February 19, 1974). On the other hand, it cannot be disputed that employers have an equally important right that their moneys be utilized to pay for benefits to persons who are actually disabled.

In addition, the State has an interest here—the interest in running an efficient and humane workmen's compensation system which assures the maximum benefits to injured workmen with a minimum of delay and at a minimum of cost. There is no doubt that the State's interest here in minimizing inefficiency and expense is legitimate. *Richardson* v. *Perales, supra,* 402 U.S. at 406. Furthermore, the State's interest here is shared by employees at large, for the greater the amounts of money paid to persons not actually disabled, and the greater the administrative expenses and inefficiencies in the workmen's compensation system, the less money will be left to distribute to injured workers as a group and the greater the delays in payments will be.

Thus, the balancing of interests involved here is very different than that in *Goldberg*. It does not advance the discussion to maintain simplistically that because the employee has an important right, the employer's interest is to be disregarded. Rather, both the employee's and employer's rights, as well as the State's interest and the interest of employees in general, must be considered.[6]

Appellants' major argument is that they are entitled to a full evidentiary hearing in place of the present more summary Rule 13 procedures before benefits may be suspended by employers. This is so according to Appellants because the issues considered "often involve conflicting and highly technical evidence" which can only be adequately ascertained at an evidentiary hearing. Br. 23-24. In fact, Appellants claim that the improper suspension of Mr. Dillard's benefits resulted from a misinterpretation of the evidence and that such problems can only be cured by a full evidentiary hearing in every case. Br. 24.

We believe that Appellants' contentions in this regard are not well taken. As we pointed out at page 17, *supra*, Mr. Dillard's case was processed *before* the present procedures under revised Rule 13 were in effect. Hence Mr. Dillard was not given the protection of the present Rule 13; had he been given that protection, he would never have had his benefits suspended because the evidence would not have supported a probable cause finding under present procedures. App. 13-16. Thus, the erroneous suspensions in Mr. Dillard's case stemmed not from the lack of an evi-

[6] We believe, along with the Amicus Curiae AFL-CIO (AFL-CIO 22), that the foregoing analysis demonstrates that the present case is entirely distinguishable from the cases now pending before this Court with respect to termination of State-funded unemployment compensation benefits. See *Crow* v. *California Department of Human Resources Development*, No. 73-1015; *Fusari* v. *Steinberg*, No. 73-848.

dentiary hearing, but from the lack of any procedure at all—a problem which has been cured by the present Rule 13.

More important is Appellants' misconception of the nature of the evidence involved in probable cause hearings. As our earlier discussion indicated, pages 15-16, *supra*, there are three types of cases in which probable cause is found. In one type, the employee has returned to work but refuses to agree to the end of compensation. The factual determination—whether the employee has or has not returned to work—in such instances is precisely the pro forma and simple type referred to by Mr. Justice White in his dissent in *Fuentes* v. *Shevin, supra,* 407 U.S. at 100. In the second type of case, the employer simply cannot locate the employee, and so swears. The factual determination here is uncontested, for if the employee appears or is located, he is entitled to benefits. In the third, albeit most frequent, type of case, the factual determination is a medical one as to the employee's fitness, and is made based upon medical reports, a practice specifically upheld by this Court in *Richardson* v. *Perales:*

> "Courts have recognized the reliability and probative worth of written medical reports even in formal trials . . . . [T]he decisions . . . demonstrate traditional and ready acceptance of the written medical report. . . . There is an additional and pragmatic factor which, although not controlling, deserves mention. This is . . . '[t]he sheer magnitude of that administrative burden,' and the resulting necessity for written reports without 'elaboration through the traditional facility of oral testimony.'" 402 U.S. at 405-06.

Finally, Appellants' contention that every case requires a full hearing misreads this Court's holdings. It has never been held that, whatever the nature of the process

found to be "due" in a particular factual circumstance, a hearing must be given in every case. Rather, even the most expansive of this Court's decisions have required only that a person be given an *opportunity* to obtain the required due process hearing prior to the suspension of benefits. See *Goldberg* v. *Kelly, supra; Fuentes* v. *Shevin, supra.* It has never been maintained that a full hearing must be supplied even to persons who do not dispute the governmental action involved, and who indicate no interest in having such a hearing. In short, whatever process is required must be made available only to those who wish to take advantage of that process. Thus, even if something more formal than the present Rule 13 procedures were to be required by due process, that "something more" would be necessary only in those instances where the employee indicated an interest in such procedures. A rule requiring a hearing in every case would exalt form over substance and would needlessly burden governmental agencies and the parties by making them go through unwanted formal procedures for persons who have no interest in contesting the action involved.

As this Court has held, determining whether a particular procedure satisfies the requirements of due process ultimately "comes down to the question of the procedure's integrity and fundamental fairness." *Richardson* v. *Perales, supra,* 402 U.S. at 410. Integrity and fundamental fairness do not always require a full evidentiary hearing. We submit that, in view of the type of factual determinations made in probable cause hearings, such hearings may properly be resolved upon affidavits and medical reports rather than only after an evidentiary hearing. Furthermore, we believe that the analysis herein demonstrates that, based upon the facts of this case and considering the interests involved and the procedures used by the Virginia Industrial Commission, the revised Rule 13 here at issue satisfies the requirements of due process.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Eastern District of Virginia should be affirmed.

Respectfully submitted,

JAMES F. FITZPATRICK
DAVID BONDERMAN
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Amici Curiae

Of Counsel:

LINDA F. BLUMENFELD
ARNOLD & PORTER
Washington, D. C.

ANDREW KALMYKOW
New York, N. Y.

RICHARD E. GOODMAN
Chicago, Illinois

March, 1974